APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1127—September Term, 1973.

(Argued June 14, 1974 Decided July 5, 1974.)

Docket No. 74-1219

UNITED STATES OF AMERICA,

Appellee,

v.

ARIEL POMARES and ANTONIO VECIANA,

Defendants-Appellants.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* for conspiracy to distribute narcotics and possess them with intent to distribute, and with the distribution of approximately seven kilograms of cocaine. 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846.

Affirmed.

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BANCROFT LITTLEFIELD, JR., Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, and S. Andrew Schaffer, Assistant United States Attorney, on the brief), *for Appellee.*

HENRY J. BOITEL, ESQ., New York, New York (Barry L. Garber, Esq., and Abraham H. Brodsky, Esq., New York, New York, on the brief), *for Appellants.*

LUMBARD, *Circuit Judge*:

After a five-day trial in the Southern District before Judge Bonsal and a jury, Ariel Pomares and Antonio Veciana were convicted on January 14, 1974 on both counts of an indictment which charged them with conspiracy to distribute narcotics and possess them with intent to distribute, and with the distribution of approximately seven kilograms of cocaine. 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846. Pomares was sentenced to concurrent terms of five years on each count, to be followed by a special parole term of three years. Veciana received concurrent terms of imprisonment of seven years on each count, also to be followed by a special parole term of three years.

On appeal, the defendants make several points, the two principal ones being that Pomares' confession to government agents was involuntary and that the government waived its right prior to trial to introduce into evidence portions of Pomares' confession. We affirm.

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The evidence at trial established that the two defendants, along with a co-conspirator who pleaded guilty, Augustin Barres, organized a cocaine smuggling ring which succeeded in smuggling twenty-five kilograms of pure cocaine into the United States from Bolivia before Barres was finally arrested while delivering seven kilograms to an undercover agent on July 23, 1973. Barres' role in the conspiracy was to help finance the purchase of the cocaine. Veciana was responsible for travelling to Bolivia, purchasing the drugs and delivering them to Bolivian diplomats who then smuggled them into the United States, while Pomares had the task of arranging sales in the United States. All three were experienced businessmen who had fled to Florida from Cuba after Castro had come to power.

After Barres' arrest, he agreed to cooperate with the government. On the basis of information which he provided, Veciana was arrested in Miami on July 24, 1973 and Pomares was arrested at his home in Puerto Rico on July 29, 1973.

Upon his arrest, Pomares was advised of his rights in Spanish by Special Agents Pinol and Amador. He was then taken to the Drug Enforcement Administration office in San Juan where, prior to questioning, he was again advised of his rights by Agent Pinol. After being advised of his rights on each of these occasions, Pomares was told that he faced heavy penalties for his smuggling activities, that he was his own best lawyer, and that the wisest course of action would be to cooperate with the government rather than exercise his right to remain silent. Pomares agreed to cooperate, and confessed twice. On the second of these occasions, Agent Pinol took handwritten notes, of what was being said. These notes were eventually put into the

form of a typewritten report and introduced as an exhibit in the suppression hearing held by Judge Bonsal to determine the admissibilty of Pomares' confession at trial. Judge Bonsal ruled that Pomares' confession was admissible.

On October 4, 1973, during a pretrial conference, the attorney for Veciana raised the issue of "a potential severance problem under *Bruton* since one of the defendants [Pomares] did give a statement and the other one [Veciana] did not." Assistant United States Attorney Bannigan responded: "I can resolve that right now. We will not use the statement."

At trial, the government took the position that it had only waived use of the written statement in order to avoid the *Bruton* problem, but that it had recently learned that Pomares had made an earlier confession, and that Special Agent Pinol was prepared to testify as to this earlier oral confession. Defense counsel objected that the government had waived its right to introduce any confession and in any event both confessions were essentially one and the same, having been obtained within no more than three hours of each other on the same day. Judge Bonsal concluded that the waiver did not reach to the earlier oral confession. In order to avoid any *Bruton* problem, however, the court ruled that only those portions of Pomares' confession could be introduced which dealt with events after Veciana had delivered the last shipment of cocaine. Thus so much of the statement as was admitted in evidence made no mention of Veciana or any transactions in which he participated.

I.

On appeal, Pomares and Veciana maintain that Pomares' confession was involuntarily obtained and therefore should

not have been admitted in evidence. They argue that the comments of the special agents who arrested Pomares that he faced severe penalties, that he was his own best lawyer, and that full cooperation with the government would be the best course were improper and coerced the defendant into confessing.

We emphasized in *United States* v. *Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967), that

> "the test of voluntariness [of a confession] is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined. . . ." *See also* Rogers 1. Richmond, 365 U.S. 534, 544 (1961).

The circumstances here do not disclose any overbearing on the part of government agents. There is no dispute that after his arrest and prior to making his oral confession, Pomares was advised three times in his native language, Spanish, of his constitutional rights and in response indicated that he understood them. The *Miranda* warning was given twice at his house after his arrest, once by Agent Amador and once by Agent Pinol, and the third time at the Drug Enforcement Administration office by Agent Pinol.

Nor is there any evidence that Pomares was subject to any threats, physical coercion, or protracted interrogation. Indeed, his arrest and arraignment occurring on a Sunday, were carried out in an expeditious fashion. He was arrested at approximately 12:15 p.m., brought to the Drug Enforcement Administration office by 1:30 and arraigned before the Chief Judge for the District of Puerto Rico at the Chief

Judge's home between 4:00 and 5:00 p.m. the same day. *See United States* v. *Drummond*, 354 F.2d 132, 144 (2d Cir. en banc 1965), *cert. denied*, 384 U.S. 1013 (1966).

No specific promises were made to Pomares. He was simply informed that it would be to his benefit to cooperate. Such statements by law enforcement officials have not been considered overbearing. *See, e.g., United States* v. *Williams*, 479 F.2d 1138 (4th Cir.), *cert. denied*, 414 U.S. 1025 (1973); *United States* v. *Glasgow*, 451 F.2d 557 (9th Cir. 1971). In *United States* v. *Ferrara, supra*, 377 F.2d 16, we held that the confession was voluntary even though federal agents had gone beyond simply urging the defendant to cooperate and had promised that he would be released on bail if he confessed. *See also United States* v. *Bailey*, 468 F.2d 652, 672-74 (4th Cir. 1972), *aff'd en banc on other grounds*, 480 F.2d 518 (1973).

Finally, it cannot be overlooked that Pomares is an intelligent, experienced businessman, aged 37 years, who was fully aware of his situation, having been informed by the agents that he had been arrested for violating the "Federal Narcotics Law." Indeed, the record reveals that he was already aware at the time of his arrest that his coconspirator, Barres, had been arrested. In light of all the circumstances, Judge Bonsal was correct in ruling that Pomares' confession was voluntary.

Surely, it is the duty of law enforcement officers to assemble all available evidence relating to the commission of a crime and this includes such information as a participant may be willing to give. Having fairly and fully advised Pomares of his constitutional rights, as required by *Miranda*, the agents were free to discuss with Pomares the reasons why he should cooperate. It was quite proper in

the course of such discussion to mention the situation which Pomares faced and the advantages to him if he assisted the government. The agents stated facts; they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching. There was every reason for the agents to act as they did; their conduct did not violate the letter or the spirit of the holding of the Supreme Court in *Miranda*.

The appellants' argument that the government waived its right to use Pomares' confession in evidence is also without merit. Judge Bonsal, who was present at the pretrial conference at which the waiver was made, concluded that the waiver was not intended to go so far as to include the prior oral confession. In any event, it was within the discretion of the trial judge to admit testimony as to this earlier oral confession, and under the circumstances it was not an abuse of discretion to do so.

Moreover, it is difficult to see how the government could have waived its right to introduce this prior oral confession, since it only learned about it at trial when Agent Pinol arrived from Puerto Rico and informed the prosecutor that there had been an earlier confession.

Nor could the defendants have been surprised by the use of the confession at trial since they were already fully aware of the substance of the admissions made by Pomares, which he had never denied. In fact, the defendants had ample opportunity to challenge the admissibility of Pomares' confession at a suppression hearing conducted during the trial and did so. At the conclusion of that hearing Judge Bonsal held that Pomares' confession was admissible.

Under the circumstances which disclose no bad faith on the part of the government or surprise to the defendants,

there is no reason to conclude that Judge Bonsal abused his discretion in admitting testimony regarding Pomares' oral confession. *See United States* v. *Cirillo*, slip op. 3297, 3312-3315 (2d Cir. May 7, 1974). It is particularly noteworthy that Judge Bonsal took great care to comply with the *Bruton* rule by having excluded those portions of Pomares' confession dealing with Veciana.

The several other arguments urged by Pomares and Veciana on appeal are also without merit.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-23

ARIEL POMARES AND ANTONIO VECIANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that (1) the manner in which petitioner Pomares was questioned following his arrest made his confession involuntary; (2) the trial court erred in rejecting their proposed instruction concerning Pomares' confession; (3) the trial court should have granted a mistrial after a government witness testified concerning Pomares' decision to stop cooperating with the government; (4) petitioner Veciana was prejudiced by the government's comment about his failure to cooperate; (5) the principles of *Bruton* v. *United States* were violated by their joint trial; (6) petitioners were deprived of their right of cross-examination and confrontation by the government's references in its summation to facts not in evidence; and (7) the government was improperly allowed to expand the scope of the indictment by proving crimes not charged.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of one count of conspiring to distribute cocaine

and to possess it with intent to distribute, and of one count of possessing seven kilograms of cocaine, with intent to distribute, in violation of 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A), and 846. Petitioner Veciana was sentenced to two concurrent seven-year terms of imprisonment, to be followed by a three-year special parole term. Petitioner Pomares was sentenced to two concurrent five-year terms of imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App.).

Petitioners and one Augustin Barres organized a cocaine smuggling ring beginning in late 1971 that ultimately was responsible for smuggling 25 kilograms of cocaine into the United States. In August 1972, through arrangements petitioner Veciana had made with a Bolivian diplomat, five kilograms of cocaine were smuggled into this country. Barres and Veciana each put up $10,000 to finance the venture, and petitioner Pomares weighed and packaged the cocaine once it arrived in Miami and then delivered it in stages to various buyers. The sale resulted in a profit of $40,000 (Tr. 74-90, 94-110).[1]

In April 1973, petitioners and Barres smuggled ten kilograms of cocaine into the coungry using the same diplomat, who hid the cocaine in his furniture. The cocaine was not as easily sold this time, but eventually Pomares' buyer was able to dispose of more than eight kilograms of it (Tr. 112-142). They used the profit from this sale to finance a third effort to smuggle cocaine.

Because there had been difficulty disposing of the second shipment of cocaine, petitioners and Barres looked for a new buyer for the third shipment. Thereafter, Barres

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[1] "Tr." refers to the transcript of the trial.

went to New York and arranged a sale of seven kilograms of cocaine to a man he knew only to be a cousin of a previous associate. In fact, the cousin was an undercover New York City Police detective, John Bruno. On July 23, 1973, when he met with Bruno to consummate the sale, Barres was arrested and seven kilograms of heroin were seized from him (Tr. 143-206).

After his arrest, Barres agreed to cooperate with the police and made a complete statement about the entire operation (Tr. 212). Thereafter, based on information supplied by Barres, federal agents obtained a search warrant for the apartment in Miami that petitioners had used for packaging and storing the cocaine. During the search, they seized three kilograms of cocaine and a weighing scale (Tr. 213).

On July 24, 1973, federal agents arrested petitioner Veciana in Miami. Five days later they arrested petitioner Pomares at his home in Puerto Rico (Tr. 214). Following Pomares' arrest, he was advised in Spanish of his rights, and he consented to a search of his residence. The agents then drove him to the Drug Enforcement Administration office in San Juan where they again informed him of his rights (Tr. 217). They told Pomares that he faced severe penalties for his involvement and that the wisest thing for him to do would be to cooperate with the government rather than exercise his right to remain silent (Tr. 421, 485). Pomares, "an intelligent, experienced businessman, aged 37 years, who was fully aware of his situation," including the fact that Barres had been arrested (Pet. App. 6a), agreed to cooperate and confessed twice. A Drug Enforcement Administration agent took notes during one of these confessions (Tr. 215-225, 227-235, 498-500).

1. Petitioners' contention that the manner in which petitioner Pomares was questioned made his confession involuntary was thoroughly considered and properly

rejected by the court of appeals, upon whose opinion we rely (Pet. App. 5a-7a). The court stated that the test of voluntariness focuses on whether the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about a confession not freely self-determined. Applying that standard, the court concluded that the evidence disclosed no overbearing by the government here. Instead, as the court said, the evidence showed clearly that Pomares was given three *Miranda* warnings and was not subjected to any threats, physical coercion, or protracted interrogation. The court specifically rejected the contention that informing Pomares that it would be to his advantage to cooperate constituted overbearing on the government's part (Pet. App. 6a-7a):

> Having fully and fairly advised Pomares of his constitutional rights, as required by *Miranda,* the agents were free to discuss with Pomares the reasons why he should cooperate. It was quite proper in the course of such discussions to mention the situation which Pomares faced and the advantages to him if he assisted the government. The agents stated facts; they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching.

Other courts have taken similar positions. See *United States* v. *Bailey,* 468 F. 2d 652, 660, 672-674 (C.A. 5); *United States* v. *Springer,* 460 F. 2d 1344, 1346-1348 (C.A. 7), certiorari denied, 409 U.S. 873; *United States* v. *Frazier,* 434 F. 2d 994, 995-996 (C.A. 5); *United States* v. *Ferrara,* 377 F. 2d 16, 17-18 (C.A. 2), certiorari denied, 389 U.S. 908; *Fernandez-Delgado* v. *United States,* 368 F. 2d 34, 35-36 (C.A. 9).

2. Citing *Lego* v. *Twomey*, 404 U.S. 477, petitioners contend that the trial court erred in refusing to instruct the jurors to disregard petitioner Pomares' confession if they found it unreliable. In *Lego*, this Court held that the "preponderance-of-the-evidence" standard is appropriate in determining the voluntariness of a confession and rejected a contention that the "reasonable doubt" standard should be used. The Court stated (404 U.S. at 485-486; footnote omitted):

> The procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession; including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.

In the instant case, the trial court, in instructing the jury on Pomares' confession, stated: "In considering these statements, ladies and gentlemen, give them such weight as you think they deserve under all the circumstances which have been brought out in the evidence in the case" (Tr. 676). Such an instruction was consistent with this Court's language in *Lego* and adequately conveyed the substance of petitioners' proferred instruction.

3. Also without merit is petitioner Pomares' contention that the trial court erred in refusing to grant a mistrial after the government elicited from a witness the fact that, after an initial confession, Pomares stopped cooperating in the hope of getting immunity (Tr. 501). Agent Pinol of the Drug Enforcement Administration testified about the circumstances surrounding Pomares' arrest, including Pomares' consent to a search of his house and his pre-arraignment confession about his involvement in the cocaine operation. Pinol testified that Pomares agreed that he would sign a written statement following his arraignment, but, after the arraignment, he balked at doing so. When Pinol inquired why, Pomares said he wanted immunity in exchange for any further cooperation. Pomares objected to this disclosure, claiming that it was a comment upon his exercise of his Fifth Amendment right to silence (Tr. 501-502). The trial court instructed the government not to go forward with this line of questioning (Tr. 502). Pomares' request for immunity was not, of course, a simple assertion of his privilege, but rather an effort to bargain over the terms of his cooperation. Accordingly, we believe that disclosure of this action on his part was not an impermissible comment on his assertion of the privilege. In any event, in view of the isolated and brief nature of this testimony and the strong evidence of guilt, any error was harmless beyond a reasonable doubt. See *Schneble* v. *Florida,* 405 U.S. 427, 430.

4. Petitioner Veciana's contention that he was prejudiced by the government's comment upon his failure to cooperate is also without merit. In his summation, the Assistant United States Attorney at one point referred to petitioner Veciana's refusal to cooperate, despite the fact that only he knew who the sources in Bolivia were (Tr. 618). Petitioner objected, and the court instructed the jury to disregard the comment (Tr. 619). Thereafter, there were

no other references to Veciana's refusal to testify. The appropriate procedure in dealing with an improper comment is an objection and an instruction from the court. This procedure was followed in the instant case.

5. Petitioners contend that their joint trial violated the principles of *Bruton* v. *United States,* 391 U.S. 123. At trial, neither Pomares nor Veciana testified, although Pomares' confession was admitted. Prior to its admission, however, all reference to petitioner Veciana and his involvement were excised. The confession as admitted discussed only events that came after Veciana was no longer in the picture. Petitioners' contention that the use of this confession at a joint trial was contrary to *Bruton* is insubstantial.[2]

Petitioner Pomares similarly asserts that he was prejudiced by testimony that showed that petitioner Veciana tried to influence the testimony of a witness. Jose Ramon Lopez, an acquaintance of petitioners, testified that once, when he entered the Miami apartment used by petitioners and Barres, petitioners got up abruptly and left together without speaking to him. Lopez was called later in the trial and testified that Veciana had asked him to testify that petitioners did not leave the apartment at the same time (Tr. 410-411). In his summation, the prosecutor commented that the effort by Veciana to influence a witness's testimony was almost an admission of guilt by him (Tr. 628).

Petitioner Pomares' contention that the admission of this testimony and the comments by the government were necessarily inculpatory as to him is without merit. Neither

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[2]Moreover, prior to trial Veciana had opposed the government's motion for a severance (Tr. 26-27).

Lopez's testimony nor the government's comments referred to any involvement of Pomares. Thus, the testimony did not inculpate Pomares by linking him with the crime charged.[3] *United States* v. *Jackson,* 482 F. 2d 1167, 1174-1175 (C.A. 10), certiorari denied, 414 U.S. 1159; *United States ex rel. Nelson* v. *Follette,* 430 F. 2d 1055, 1057-1059 (C.A. 2), certiorari denied, 401 U.S. 917.

6. Petitioners contend that they were deprived of their rights of cross-examination and confrontation by the Assistant United States Attorney's repeated references in summation (Tr. 616-652) to aspects of Barres' confession never admitted into evidence. However, the references were to Barres' trial testimony and to the testimony of other witnesses, and not to anything not admitted in evidence. At trial, Barres testified about the entire operation, including his involvement and that of Veciana and Pomares. In addition, he testified about his arrest and the information he gave the government after his arrest. Barres' testimony about his cooperation with the government was corroborated by a number of other witnesses.[4]

In any event, the jury was repeatedly told by the court and the prosecutor that what the lawyers say is not evidence and that only the testimony of the witnesses is evidence (Tr. 38, 41-42, 619, 659). Petitioners made no request for a further instruction and do not assert that the instructions given were inefficacious. Cf. *Donnelly* v. *DeChristoforo,* No. 72-1570, decided May 13, 1974.

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[3]Moreover, Lopez was available for cross-examination.

[4]Petitioners give no record reference supporting their contention that the Assistant United States Attorney stated that Barres' testimony was "detail for detail" like his confession (Pet. 14), and we are unable to find any such comment. Although the prosecutor did state that "each detail of Barres' statement about Pomares is corroborated by the lease, the hotel reservations, the trip to New York on Amtrak, the Crossway" (Tr. 624), it is apparent in context that that reference was to his statement as a witness.

7. Petitioners' contention that the trial court erred in admitting evidence of two narcotics sales not charged in the indictment is insubstantial. The indictment charged a conspiracy to distribute and to possess narcotic drugs with intent to distribute, taking place during the period from November 1, 1972, to August 10, 1973; it further charged petitioners with distributing seven kilograms of cocaine.

Evidence at trial detailed the initiation and operation of the cocaine ring run by petitioners and Barres. Included was testimony about sales of cocaine in August 1972 and April 1973. The April 1973 sale was evidence that directly proved the conspiracy charge and thus was unquestionably properly admitted. Evidence of the first sale, which took place before the period specified in the indictment, was relevant to proof of development of the conspiracy, and to the issue of petitioners' knowledge and intent, and was thus properly admitted. *United States* v. *Harrell,* 436 F.2d 606, 612 (C.A. 5); *United States* v. *Del Purgatorio,* 411 F.2d 84, 86-87 (C.A. 2); *United States* v. *Battaglia,* 394 F.2d 304, 313 (C.A. 7), vacated on other grounds *sub nom. Giordano* v. *United States,* 394 U.S. 310, adhered to after remand, 432 F.2d 1115, 1118-1119 (C.A. 7), certiorari denied, 401 U.S. 924; *Williamson* v. *United States,* 310 F.2d 192, 199 (C.A. 9); cf. *Lisenba* v. *California,* 314 U.S. 219, 227.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.